United States Senate
COMMITTEE ON SMALL BUSINESS
WASHINGTON, DC 20510–6350

November 12, 1999

Ms. Laurie Duarte
General Services Administration
FAR Secretariat (MVR)
1800 F Street NW, Room 4035
Washington, DC 20405

Re: FAR Case 99-010

Dear Ms. Duarte:

As Chairman of the Senate Committee on Small Business, I submit the following comments concerning FAR Case 99-010, Contractor Responsibility, Labor Relations Costs, and Costs Relating to Legal and Other Proceedings. The Small Business Act declares the policy of the United States that small business shall have the "maximum practicable opportunity to participate" in Federal procurement opportunities, and I am gravely concerned that the proposed rule would severely impede the achievement of that goal.

Overall, these proposed rules will have a chilling effect on small business participation in Federal contracting. Although the rules do not expressly do so on their face, in practice they will create an unofficial "list" of disfavored firms, without the due process protections offered by the debarment list currently maintained by the Government. Prime contractors will be unable to know which subcontractors will be acceptable for use in Government procurement. Contracting officers will be given broad discretion to enforce regulations in which they are not specialists, raising the prospect of arbitrary enforcement and error not subject to review.

In addition, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have misconstrued and thus wrongly ignored the requirements of the Regulatory Flexibility Act. Blithely to assume that this proposal will not affect small businesses doing business with the Federal government, without conducting any level of analysis, is to ignore the letter and spirit of the Regulatory Flexibility Act.

The proposed rules would amend subpart 9.1 of the Federal Acquisition Regulation (FAR), providing standards and examples for determining whether prospective contractors and subcontractors are "responsible." Only responsible contractors and subcontractors are eligible for award of Federal contracts. (FAR § 9.103(a).) Generally, the standards emphasize the contractors' and subscontractors' ability actually to perform the contract, such as availability of financial resources, ability to meet delivery schedules, satisfactory past performance, "a satisfactory record of integrity and business ethics," and technical capacity. (FAR § 9.104-1.)

Contractors and subcontractors deemed to be not responsible and who are therefore ineligible for Government contracts are entered onto a list maintained by the General Services Administration (GSA), the "List of Parties Excluded from Federal Procurement and Nonprocurement Programs" (hereinafter "the debarment list"). (FAR §§ 9.402(a), 9.403.) Listing a firm in the debarment list is a serious decision intended to protect the Government's interest in doing business only with firms that will actually deliver the Government's procurement needs in conformity with the provisions of a contract. It is not intended as a punishment for contractors and subcontractors:

> The serious nature of debarment and suspension requires that these sanctions be imposed only in the public interest for the Government's protection and not for purposes of punishment. Agencies shall impose debarment or suspension to protect the Government's interest and only for the causes and in accordance with the procedures set forth in this subpart [FAR subpart 9.4]. (FAR §9.402(b).)

Although the FAR expressly states that inclusion in the debarment list is not intended as a form of punishment, the FAR also recognizes the serious economic consequences that listing implies for those firms. Thus, the FAR provides numerous due process protections. Agencies seeking to list a firm on the debarment list are to establish procedures that include notice to the firm and opportunity for response by the firm. (FAR § 9.406-3.) Debarment is for a fixed period of time commensurate with the seriousness of the cause, generally not more than three years. (FAR § 9.406-4(a).) Mitigating factors are considered, such as whether the firm has disciplined the persons responsible for the wrongdoing at issue and whether other remedial actions have been taken. (FAR § 9.406-1(a).) Most importantly, a firm may be listed in the debarment list "upon conviction of or civil judgment for" various statutory violations; this effectively incorporates the due process protections afforded by the adjudicative processes that lead to such conviction or judgment. (FAR § 9.406-2(a).)

None of these due process protections is afforded under the proposed regulations. Although the rulemaking is colored as simply a clarification of what the FAR means in requiring "a satisfactory record of integrity and business ethics" for determining contractor responsibility, the regulation actually goes much further than that. It allows a firm to be deemed not responsible if the contracting officer has "persuasive evidence" of the firm's noncompliance with tax laws or substantial noncompliance with labor, employment, environmental, antitrust, or consumer protection laws. "Persuasive evidence" is not limited to a conviction or civil judgment through a process of adjudication, thus eliminating the due process protections afforded by such adjudication. The contracting officer is deemed to be omnicompetent, able to substitute his or her judgment against a firm even when the adjudicatory bodies responsible for enforcing such laws have made no decision.

Indeed, the "persuasive evidence" standard is virtually a blank check for a contracting officer to exercise unlimited discretion in determining noncompliance with laws the contracting officer may be poorly trained to interpret. In practice, this will lead to contracting officers using the "contractor responsibility" requirement as a means of imposing penalties for perceived or alleged violations of these laws, including violations that did not result in penalties from the bodies responsible for their enforcement. This disregards the FAR's express statement that determinations of nonresponsibility (as embodied in the debarment list) are for the protection of the Government in its procurement and not for the imposition of penalties. (FAR § 9.402(b).)

The proposed regulations go farther still. Rather than add to the list of causes why a firm might be added to the debarment list, the regulations incorporate the new criteria and the "persuasive evidence" standard into the FAR section setting forth the general standards for determining responsibility. These standards guide contracting officers in making an "affirmative determination of responsibility," which the contracting officers must make or a firm will be deemed nonresponsible. (FAR § 9.103(b).) Although a firm's entry into the debarment list is one reason for deeming a firm nonresponsible, it is not the only one. The proposed regulations place the new, vague standards into the sections granting contracting officer this wider discretion--thus bypassing all the due process protections otherwise afforded a firm entered on the debarment list. Opportunities for notice and response by the firm, time limitations, consideration of mitigating factors--these protections are to be swept away in favor of unchecked discretion by a contracting officer.

The regulations also would harm, not improve, efforts to subcontract with responsible firms. Currently, a prime contractor may not subcontract with a debarred subcontractor unless it finds "compelling reason" to do so and notifies the contracting officer in writing. The contracting officer may not consent to such a subcontract unless the agency finds "compelling reasons" as well. (FAR § 9.405-2.) Because the debarment list is a public document, available by printed subscription from the Government Printing Office as well by electronic versions, prime contractors can ascertain whether a prospective subcontractor is on the list and therefore ineligible for subcontracting. This enables the prime contractor to focus its efforts on subcontractors likely to receive consent from the contracting officer.

However, the proposed regulations would make the contracting officer's consent a moving target. Firms disfavored by the contracting officer, because of "persuasive evidence" of noncompliance, are not public knowledge. No adjudication of wrongdoing may have occurred, and no record of conviction or civil judgment exist. No entry appears on the debarment list available to the prime contractor. The prime contractor is left to guess who might be acceptable to the contracting officer, and if the prime contractor's guess turns out to be in error, the next step is to make another guess. At a time when procuring agencies claim to rely upon subcontracting to offset the harm done to small business by contract bundling, this disruption of subcontracting plans will prove even more harmful.

Worse, these harmful outcomes are completely unnecessary. Existing regulation is more than adequate to handle any genuine problems in this area. A firm that violates Federal laws may be deemed ineligible for contracting and placed on the debarment list, after due process has been given. The FAR already takes account of genuine violations of these laws:

> "Ineligible". . .means excluded from Government contracting (and subcontracting, if appropriate) pursuant to statutory, Executive order, or regulatory authority [such as] the Davis-Bacon Act and its related statutes and implementing regulations, the Service Contract Act, the Equal Employment Opportunity Acts and Executive orders, the Walsh-Healey Public Contracts Act, the Buy American Act, or the Environmental Protection Acts and Executive orders. (FAR § 9.403.)

If a firm is found in violation of these acts by a competent adjudicatory body under known evidentiary standards--not by "persuasive evidence" held by a contracting officer acting without due process, the firm can be found ineligible and placed on the debarment list. Nothing in the rulemaking indicates that the existing process is inadequate or provides insufficient protection to the Government's procurement interests.

In a separate change to FAR Part 31, "Contract Cost Principles and Procedures," the rulemaking backtracks on the Government's neutral stance on unionization efforts, while claiming not to do so. The proposed regulation would classify "costs incurred for activities related to influencing employees' decision regarding unionization" as unallowable contract costs. Existing regulation allowing costs for "shop stewards, labor management committees, employee publications, and other related activities" would remain unchanged.

This is not a neutral stance, despite the rulemaking's claim that it is. Viewed as a whole, the amended policy on labor relations costs would allow costs for union advocates but disallow costs for management. I support the Government's policy on neutrality and believe employees and employers should exercise their collective bargaining rights and responsibilities under the law without undue Government bias or interference. Therefore, I oppose the new regulatory language as a set-back to such neutrality.

The rulemaking would also disallow legal costs associated with any judicial or administrative proceeding brought by the Government if the result is a finding that the contractor violated a law or regulation. Existing regulation is more than adequate to handle legitimate concerns in this area. Under existing policy, legal costs already are unallowable if associated with a proceeding resulting in a criminal conviction, finding of liability in cases of fraud or misconduct, imposition of a monetary penalty, debarment, or termination of a contract. As with the contractor responsibility portion of this rulemaking, the proposed regulation seeks to use the FAR to impose penalties on contractors when competent

adjudicatory bodies have refrained from doing so. This sets up the contractors for harassment on minor and technical regulatory violations, since serious violations already are covered by existing regulation. This change should be dropped as well.

In publishing the proposed rule, the Councils certified that this proposal "is not expected to have a significant economic impact on a substantial number of small entities." To support this certification, the Councils stated that "most contracts awarded to small entities do not involve use of formal responsibility surveys. . .and do not require application of the FAR cost principles." (64 Federal Register 37360 at 37361.) Thus, the Councils did not perform an Initial Regulatory Flexibility Analysis (IRFA), nor did the Councils report conducting any type of economic screening analysis that could have indicated the need to conduct an IRFA.

Under the Regulatory Flexibility Act, whenever an agency is required to publish a notice of proposed rulemaking, it is required to prepare and publish in the Federal Register, along with the proposed rule, an IRFA. (5 USC § 603(a).) The lone exception to this requirement is if the agency can "certify" that the proposed rule will not have "a significant economic impact on a substantial number of small entities." If the agency certifies to this, it must publish that certification in the Federal Register at the time of the notice of proposed rulemaking "along with a factual basis for such certification." (5 USC § 605(b).) Even then, the Regulatory Flexibility Act encourages agencies that are not bound by this requirement to conduct a regulatory flexibility analysis anyway.

Merely stating that small businesses will not be affected by the proposal because "*most* contracts awarded to small entities do not involve use of formal responsibility surveys" (64 Federal Register 37360 at 37361; emphasis added) ignores the fact that larger contractors that must use the formal responsibility surveys, and that will be required to comply with this section, will in turn impose the requirements of this section on their subcontractors, who are likely to be small businesses. Indeed, under some Government contracting programs, these subcontractors are required to be small businesses. Furthermore, merely because "most contracts awarded" do not require the formal responsibility surveys does not mean that all of them would not require the surveys. It is still entirely possible for the regulation to impose "a significant economic impact on a substantial number of small entities," particularly within certain industries where small businesses predominate, such as construction. Thus, this rule will have an impact on small businesses, and the Councils' unwillingness to examine that impact suggests a callousness with respect to small businesses.

For all the reasons set forth above, I believe the proposed regulations published at 64 Federal Register 37360-61 (July 9, 1999) are harmful to the procurement process so critical to small businesses. Accordingly, the rulemaking is not salvageable and should be withdrawn in its entirety.

If you have questions about these comments, please contact Cordell Smith or Marc Freedman of the Senate Small Business Committee staff on (202)224-5175.

Sincerely,

Christopher S. Bond
Chairman